

FINAL ORDER
03-08

A Due Process Hearing request was submitted by the Hamilton County School District on February 29, 2003. On March 13, 2003, the State Department of Education appointed this Administrative Law Judge to hear the case. A Pre-Hearing Conference was set for May 19, 2003 where a trial date was set for late July, 2003. The dates of the Hearing were moved forward by mutual consent and the Hearing was heard on July 10 and 11, 2003 in Chattanooga, Tennessee.

Diagnosed with moderate to severe autism and severe verbal apraxia, (E-7, E-20) Z. is entitled to a Free Appropriate Public Education ("FAPE") which is specifically designed and tailored to meet his unique individual needs under the Individual with Disabilities Education Act ("IDEA") as a disabled child in the Hamilton County Department of Education ("HCDE") jurisdiction. (E-20) This hearing request was prompted by parent's request for an independent educational evaluation ("IEE") following the School System's completion of an evaluation of Z. by Dr. B.J. Freeman in September 2002. In responding to a request for an IEE, the School System may either elect to provide the provide the IEE at public expense or initiate a due process hearing to show that its evaluation is appropriate. [34 CFR 300.502(b)(2); Tennessee State Board of Education Rule 0520-1-9-.14(6)] As specifically noted by this Court, no other issues have been presented for decision, as the parent did not act to raise justiciable issues. (Tr. 455-456).

I. Findings of Fact

Z. is a nine year-old child diagnosed with autism. “Autism” means a developmental disability, which significantly affects verbal and nonverbal communication and social interaction, generally evident before the age three (3), that adversely affects a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.” Tennessee State Board of Educational Rule 0520-1-9-.01(15)(a); see also Tr. 90-91.

During the course of the former FAPE litigation, including the time during which the School System completed the evaluations at issue here, Z. has been in a stay-put placement that obligated the School System to reimburse the parents for up to 30 hours per week of “Lovaas style ABA therapy”. (Exhibit 20, p. 39). In addition to complying with the stay-put placement by funding the parents’ selected private home program, the School System has provided additional services to Z. in the form of attendance in the public program, including both regular and special education, in accordance with his parent’ requested schedule and extensive speech language therapy. Currently, the United States Circuit Court of Appeals for the Sixth Circuit has before it an appeal of Judge J. Allen Edgar’s decision finding that the School System at all times has offered Z. a free appropriate public education. (Exhibit 24).

Dr. Freeman, the School System’s chosen psychological evaluator, participated in the August 12, 2002 IEP meeting. (Exhibit 4; Tr. 113-114). During the meeting, Dr. Freeman gained information about Z. from others, including Z.’s current speech language

pathologist, his private home supervisor, his lead teacher and other IEP team members. (Exhibit 4, pp. 1-76; Tr. 113-114). Also during this meeting, Dr. Freeman discussed the likely components of the requested psychological evaluation and explained the assessment process to the parents and other members of the IEP team. (Exhibit 4, pp. 55-59; Tr. 115-116). Based on the extremely detailed discussion of Z.'s abilities and needs with Dr. Freeman's participation, the IEP team developed an assessment plan that was proposed to the parents for their consent. (Exhibit 4-pp. 1-76; Exhibit 5; Tr. 116-118).

On July 29, 2002, the School System gave notice of an IEP team meeting to discuss, *inter alia*, evaluations of Z. (Exhibit 9; Tr. 217). On August 12, 2002, the School System convened the IEP meeting during which the IEP team requested parental consent to complete assessments. (Exhibit 4, pp. 58-61; Tr. 217-218). The IEP team indicated a need for more information on Z.'s educational needs, his educational program, and how the school could make his program more successful for him. (Exhibit 4, p. 1-76; Tr. 108, 133-134, 220). To this end, the IEP team requested that a psychological evaluation be completed. (Tr. 220).

At an IEP meeting convened on August 29, 2002, the team again discussed the assessments that the team wished to have completed regarding Z. (Exhibit 10, pp. 1-10; Tr. 218). At that meeting, the IEP team completed an assessment plan—the School System's form to document requests and secure parental consent. (Exhibit 5; Exhibit 10, pp. 1-10; Tr. 219). The parents did sign the consent form on August 29, 2002. (Exhibit 5; Tr. 219-220).

Dr. B.J. Freeman was chosen by the school system to complete the evaluation. Dr. Freeman is the Director of Clinical Services for Children with Autism at the University of California at Los Angeles and Professor of Medical Psychology in the Department of Psychiatry and Biobehavioral Science at the University of California School of Medicine. (Exhibit 3.; Tr. 80-87). Dr. Freeman has earned an excellent reputation in the field of autism both in terms of diagnosis and clinical practice. (Tr. 48). Dr. Freeman was recognized without objection as an expert in the diagnosis, assessment and treatment, including educational programming and interventions for children with autism. (Tr. 103-104).

Dr. Freeman's long career in research resulted in most recently in her appointment as the principal investigator on a grant from the National Institute of Mental Health in which she will be conducting the assessment portion of research directed at creating centers of excellence for the treatment of children with autism. (Tr. 81). In addition to her role in formulating a definition for the diagnosis of autism contained in the Diagnostic and Statistical Manual from the American Psychiatric Association, Dr. Freeman also was appointed to a blue ribbon panel by the California State Department of Developmental Disabilities to develop guidelines of appropriate assessment for children with autism. (Tr. 87-90).

With respect to practical experience in assessing individuals with autism, Dr. Freeman has completed more than one thousand evaluations over her thirty-year career. (Tr. 96-97). She holds a license in the State of California and secured temporary licensure to practice psychology in the State of Tennessee prior to completing the assessment of Z. (Tr. 111-113). Dr. Freeman applied for licensure immediately upon

becoming aware of the applicable regulation and before completing the evaluation at issue. (Tr. 111-113). Upon Dr. Freeman's prompt notification of her actions and intended actions in the State of Tennessee, the governing Board immediately notified Dr. Freeman by telephone of her approval for temporary licensure and forwarded a formal written response contemporaneously. (Exhibit 52, Attachment 1).

Dr. Freeman receives the majority of referrals from parents seeking additional information about their child's strengths and weaknesses and appropriate educational interventions. (Tr. 97). Dr. Freeman also participates regularly in IEP meetings for students whom she has assessed. (Tr. 101-102). Ninety percent of the meetings that Dr. Freeman or her staff attend are at the request of the parents. (Tr. 101). Moreover, at least 60 % of Dr. Freeman's previous testimony has been offered at the request of parents, not school districts. (Tr. 102). Clearly, Dr. Freeman indicated that she was subject to no inappropriate attempts to influence her report and would not have been responsive to such attempts. (Tr. 180, 205).

Dr. Freeman has extensive experience in assessing children like Z. who may be considered non-verbal or significantly limited in their ability to communicate verbally. As children with autism are by definition impaired with their ability to communicate, Dr. Freeman has evaluated a significant number of children who were non-communicative. (Tr. 98-99). Approximately 10-30% of the evaluations that Dr. Freeman has completed have been of children who were non-verbal or limited in their ability to communicate verbally by a neurological condition known as oral dyspraxia. (Tr. 98-99).

In assessing children with autism, the ethical and professional guidelines that govern the practice of psychology require that a child's disability must be taken into

account in the assessment process so that the child's abilities may be accurately ascertained. (Tr. 96). The National Academy of Science recently published guidelines for the assessment of children with autism based on a comprehensive review of current research. (Exhibit 6; Tr. 121-122). All of these sources make clear that as children with autism may exhibit inconsistency in development, appropriate assessment requires that multiple areas of children's development be considered in a variety of situations. (Exhibit 6, p. 27; Tr. 92-93). In addition, since children with autism may exhibit skills in some areas and not others (known as splinter skills), interdisciplinary assessment is absolutely critical. (Exhibit 6, p. 27; Tr. 92-93. 133).

Specifically, assessment tools used with children with autism must allow the evaluator to break down and "flesh out" different skills, not just general areas, so that an accurate measure may be made of the child's actual skills and abilities. (Exhibit 6, p. 27; Tr. 93). Also, as children with autism have difficulty in generalizing skills from one environment to another, the assessment must consider the child's function in the child's natural environments, including both home and school in order to develop an accurate picture of the child's strengths and weaknesses. (Exhibit 6, p. 27; Tr. 91-94). It is particularly important to look for consistency of information across environments to get an accurate picture of the child's strengths and weaknesses. (Tr. 93-94).

Objective, or standardized, testing has less utility in the assessment of children with autism because the tests frequently must be modified in their administration due to the social communication of nature of the disorder. (Tr. 95; Exhibit 6, p. 27-29). When an evaluator modifies the administration of standardized tests, the results must be subject to a different level of interpretation. (Tr. 95.) In addition, a child with autism may

demonstrate a wide scatter of scores on the various subtests of a standardized testing instrument, so that an overall, averaged score will not reflect accurately the child's abilities. (Tr. 95-96; Exhibit 6, p. 27). Thus, the emphasis of the evaluation must be on achieving an accurate profile of abilities rather than overall test scores. (Tr. 95-96; Exhibit 6, p. 27).

As children with autism are often able to learn skills but do not use those skills functionally, evaluations must focus on the child's ability to achieve independence by using skills in day-to-day living. (Tr. 91-92).

Modifications are considered absolutely necessary in order to assess appropriately children with autism. (Tr. 128). Not only is the need for modifications recognized in the field, but the State of Tennessee's ethical and professional guidelines and the national professional guidelines also require that the testing instruments used are appropriate to the population and that any modifications made are based on the available scientific literature. (Tr. 129). Indeed, given his identification as a child with autism and the fact that he is nonverbal, it would be unethical to assess Z. without modifications. (Tr. 129.).

Consistent with the standards of professional practice for assessment, Dr. Freeman's assessment included gathering significant amounts of information from multiple sources. (Tr. 120).

As a part of her assessment, Dr. Freeman observed Z. in his home program and at school on September 13, 2002. (Exhibit 7: Tr. 110-111, 120, 139). The observations allowed Dr. Freeman to see what Z. would and would not do in terms of using his skills in different environments. (Tr. 140-141). Dr. Freeman observed that he had difficulty communicating with his augmentative communication device, the Pathfinder. (Tr. 142).

In addition, Dr. Freeman observed that Z. is very prompt dependant and would wait to be told to do something rather than act independently. (Tr. 141). Prompt dependency is an important consideration for children with autism because a trademark of autism is difficulty with initiation, motivation, organization and dependence. (Tr. 141).

In addition to observing Z. and participating as a member of multiple IEP team meetings, Dr. Freeman completed multiple interviews as a part of the assessment process. She interviewed Z.'s parents, including his mother in her role as Z.'s primary therapist. (Tr. 120, 139, 143-146; Exhibit 5, p. 2). Also, Dr. Freeman interviewed a number of Z.'s current public school service providers, including his speech language pathologist, his one-to-one assistant and his special education teacher. (Tr. . 120, 144). Finally, Dr. Freeman gained information from the supervisors of Z.'s home program during the August 12, 2002 and November 22, 2002 IEP meetings. (Tr. 145-146; Exhibit 4, pp. 1-76; Exhibit 8, pp. 1-92).

The purpose of the interviews is to ensure that the information gathered during the formal observation and testing is consistent with what the persons involved in the child's day-to-day life observe and know about him. (Tr. 144). Dr. Freeman found great consistency in the reports of all those that she interviewed, including the IEP team members. (Tr. 146-147).

In terms of standardized testing, Dr. Freeman selected portions of the Stanford-Binet Intelligence Scale ("Stanford-Binet") because it tests multiple areas of functioning, including visual, memory, and math. (Exhibit 7; Tr. 117-118, 120). In addition, while previous versions of the Stanford-Binet primarily relied on child's verbal abilities, the version used by Dr. Freeman (the most current at the time) allows the evaluator to

consider verbal skills totally independent of nonverbal skills. (Tr. 127-128). Dr. Freeman has been using the Stanford-Binet routinely in her practice since the 1980's when she was trained by the test developer. (Tr. 125-126).

To accommodate Z.'s disability, Dr. Freeman modified the Stanford-Binet test to allow Z. to respond using his augmentative communication device. (Tr. 99-100, 128). She also used the nonverbal skills subtests with modifications, primarily using his mother to communicate with Z.. to ensure that he understood the instruction. (Tr. 128.). Dr. Freeman's report accurately reflected this modification. (Exhibit 7). Additional modifications included the use of a lot of positive reinforcement and frequent breaks. (Tr. 131). Based on modifications used, Dr Freeman's report appropriately cautioned against the use of standardized and cognitive testing. (Exhibit 7, p. 2).

As an IQ score was not a necessary or desired outcome of the assessment, Dr. Freeman selected the Stanford-Binet because it allows the evaluator to break down skills to obtain a profile of abilities rather than an overall score (Tr. 119, 124-129). The Stanford-Binet is validated for the purposes for which Dr. Freeman used it at the third level of interpretation—the qualitative level. (Tr. 129-130). Dr. Freeman derived from the Stanford-Binet qualitative information in terms of Z.'s strengths and weaknesses in highly structured situation when he is motivated (Exhibit 7, p. 3; Tr. 125-127). The testing showed that Z. has very good visual skills, including in the areas of matching and visual memory, and also demonstrates a relative strength in the area of math. (Exhibit 7; Tr. 130).

To consider Z.'s day-to-day use of his skills, Dr. Freeman used the Vineland Scaled of Adaptive Behavior ("Vineland"). (Tr. 120, 127, 134-139). As the Vineland is

an interview measure completed with the parents. Dr. Freeman administered the test in accordance with its standards and derived standard scores. (Tr. 124, 135-137).

Dr. Freeman has extensive experience and training in using the Vineland. Not only has she used it in her clinical practice for many years and conducted research projects incorporating the Vineland, but also Dr. Freeman's clinical UCLA is a demonstration site for the new version of the test that will include norm samples specific to children with autism and allow comparison of children with autism to their typical as well as other autistic peers. (Tr. 137).

Dr. Freeman's administration of the Vineland showed that Z. had significant impairments, particularly in his social skills. The testing did reveal that Z. had developed some skills in terms of jobs at home—information that the IEP team used to develop similar goals for the school environment. (Tr. 138, 224). Also, Dr. Freeman found that Z.'s biggest area of need continued to be in the area of communication. (Exhibit 7: Tr. 137-138).

As a result of her testing, Dr. Freeman provided a great amount of information regarding his strengths and weaknesses to the IEP team. (Exhibit 7). In addition, Dr. Freeman made recommendations in terms of approaches, including the use of his one-to-one aide, and strategies to help facilitate Z.'s independence and increase his motivation. (Tr. 141-142).

Dr. Freeman complied with all standards of professional practice in completing her evaluation. (Tr. 149).

The School System selected Dr. Craig Kennedy to complete the functional behavioral assessment requested by the IEP team at the August 2002 IEP meetings. Dr.

Kennedy is a nationally certified behavioral analyst who has been working with children autism spectrum disorder for more than 20 years. (Tr. 22, 25). Currently, Dr. Kennedy is the Director of the Behavioral Disorders Clinical at the John F. Kennedy Center on Human Development, Associate Professor in the Peabody College of Education, and Associate Professor in the Department of Pediatrics in the Vanderbilt Medical Center—all of Vanderbilt University. (Tr. 19). He is extensively qualified in the assessment of problem behaviors of people with developmental disabilities, including the assessment of those behaviors in both home and school environments. (Exhibit 1, Tr. 20-29). In fact, Dr. Kennedy served on the national review panel for the Behavioral Analyst Certification Board to consider the ethical standards applicable to behavioral analysis. (Tr. 22).

Specifically, Dr. Kennedy has conducted approximately a thousands programmatic reviews, functional behavioral assessments, and evaluations in his career. (Tr. 24). Dr. Kennedy was recognized without objection as an expert in the diagnosis and assessment of and development of interventions including educational programming for children with behavioral issues, including children with autism. (Tr. 29.).

A functional behavioral assessment (“FBA”) is a process used to identify the reason(s) why a child is engaging in problem behaviors, e.g. self-injury, aggression, property destruction, and to develop interventions that can remediate the reasons for the problem behaviors. (Tr. 25-27). FBAs have been recognized since the mid-1980’s when Dr. Kennedy was involved in the development of the assessment process at the University of Oregon. (Tr. 26). FBAs incorporate multiple forms of assessment including interviewing care providers, teachers, parents, and observations of the child in their natural environments. (Tr. 26).

Dr. Kennedy began his FBA of Z. in September 2002. As a part of his on-site activities with Z., Dr. Kennedy met Z., observed him in his home program and at school, and interviewed his parents and service providers. (Exhibit 2; Tr. 31-33).

Dr. Kennedy interviewed parents, Z.'s speech language pathologist, his general education teacher, and Z.'s one-to-one assistant using Functional Analysis Interviews (FAI). (Tr. 33-36). The FAI is a documented interview form designed to collect information about the nature of the problem behavior, its duration, intensity, frequency, patterns of occurrence, any potential health problems that might contribute to the behavior, and associated times, people, places and things. (Tr. 33-34). In accordance with professional practice, the individual utilizing the FAI collects the information necessary to arrive at a clear hypothesis of the reasons the behavior may be occurring and may be occurring and may test that hypothesis through observation of the child. (Tr. 36-37). As the information gathered from the interviews is in the form of verbal reports, Dr. Kennedy, as a clinician, interpreted the information based on his experience and "weigh[ed] the information against prior experience with children with autism and other disabilities and also what I observe while I'm there." (Tr. 76-77).

Dr. Kennedy also observed Z. in multiple environments—both in his home program and in a number of settings in his school program—using the A-B-C technique. (Tr. 37-38). A-B-C observation is a well-established technique in the field where a trained person observes the child in his natural environment and looks for the antecedent (or precipitating event) to behaviors, the problem with behavior itself, and the consequence for such behavior. (Tr. 37-38). The information is recorded anecdotally and used to determine why a student may be engaging in the problem behaviors. (Tr.

37-38). For example, a child might respond to various environments by demonstrating behavior to get a person's attentions, to escape instructional demands or in response to unpleasant stimulus, e.g. excess noise. (Tr. 37-38).

As a result of his FBA, Dr. Kennedy concluded that Z. was exhibiting low levels of problem behavior that were not a current concern at home or at school though they had been in the past. (Exhibit 2; Tr. 42, 227). In his educational setting, Z. did not exhibit behaviors that interfered with his education or social interactions. (Exhibit 2; Tr. 44, 227). Moreover, the minimal behaviors that were occurring were addressed appropriately by interventions, redirection, and working with Z.'s communication system. (Exhibit 2; Tr.43-44).

As a result of his work, Dr. Kennedy made several recommendations for the IEP team's consideration including: that Z. attend the public school program full-time and that an assistive technology evaluation be completed to determine whether Z.'s augmentative communication device as appropriate for him. (Exhibit 2; Tr. 45-47).

In November 2002, the School System gave notice for an IEP team to discuss the assessments, review Z's progress and performance and to review and revise his IEP. (Exhibit 11; Tr. 222, 226). At that meeting, both Drs. Freeman and Kennedy's reports were shared with the IEP team, including the parents. (Exhibit 8; Tr. 32, 47-48, 111, 147-148, 222, 226).

The IEP team did request that the parents allows the School System to complete an AT evaluation at the November 22, 2002 IEP meeting, but the parents declined to consent. (Exhibit 8, pp. 117-118; Tr. 143). While seeking consent to complete the AT evaluation, the IEP team did not recommend a change in Z.'s augmentative

communication device (the Pathfinder). Rather, the IEP team engaged in a thorough discussion, including the recommendations of the representative of Z.'s home program, of Z.'s communication needs and made some revisions to incorporate the use of gestures and other strategies for immediate communication needs. (Exhibit 8, see p. 111).

At the next IEP meeting on December 11, 2002, the family told HCDE members of the IEP team that they disagreed with the evaluations of Dr. B.J. Freeman and Dr. Craig Kennedy and exercised a parent's right to request an independent educational evaluation ("IEE")

Ms. Jane Dixon, a supervisor in the exceptional educational department, wrote a letter on December 19, 2002, to the family regarding the request for an independent educational evaluation. (E-50) The parents replied to this letter on January 8, 2003. (E-53)

II. Issue

1. Whether the assessments performed on behalf of the School System by Drs. Freeman and Kennedy met the requirements of the Individuals with Disabilities Education Act as implemented in Tennessee?

III. The Law

The purpose of the Individuals with Disabilities Education Act ("IDEA") is to ensure that all children with disabilities have available to them a Free Appropriate Public Education (FAPE) that emphasizes special education and related services designed to

meet their unique needs and prepare them for employment and independent living. 20 USC Sec. 1401(25)

Under the IDEA, evaluations and re-evaluations are conducted on children with disabilities for various reasons. One reason for an evaluation is to determine eligibility for special education. But the law highlights the purpose of evaluations is not limited to eligibility decisions only. Evaluations are used to “gather information...that provide(s) information...in determining...the present levels of performance and educational needs of the child...and (determine) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals...” set out in the IEP. 20 USC Sec. 1414(b) (1), (2), (3), (4), and (5). Procedures for evaluations shall determine the educational needs for the child. 20 USC 1414 (a)(1)(B). Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided. 20 USC Sec. 1414(b)(3)(D). The IEP team shall consider the special factors of a child’s communication needs...including opportunities for direct instruction in the child’s language and communication mode...” 20 USC 1414(d)(3)(B).

Stated below are the State of Tennessee regulations regarding evaluation procedures:

(7) At a minimum, the local school system shall meet the following evaluation procedures:

- (a) Tests and other evaluation materials used to assess a child:
 - 1. Are selected and administered so as not to be discriminatory on a racial or cultural basis; and
 - 2. Are provided and administered in the child’s native language or other mode of communication, unless it is clearly not possible to do so.
- (b) Materials and procedures used to assess a child with limited English proficiency are selected and administered to ensure that they measure the extent to which the child has a disability and needs special education, rather than measuring the child’s English language skills.
- (c) A variety of evaluation tools and strategies are used to gather relevant functional and

developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum (for a preschool child, to participate in appropriate activities) that may assist in determining:

1. Whether the child is an eligible child with special education; and
 2. The content of the child's IEP.
- (d) Any standardized tests that are given to a child have been validated for the specific purpose for which they are used and are administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the test.
- (e) If an evaluation is not conducted under standard conditions, a description of the extent to which it varied from standard conditions must be included in the evaluation report.
- (f) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.
- (g) Tests are selected and administered.
1. Tests are selected and administered so as best to ensure that if a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude; or
 2. Achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).
- (h) No single procedure is used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.
- (i) The child is evaluated in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.
- (j) In evaluating each child with a disability, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.
- (k) The local school system uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.
- (l) The local school system uses assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child.

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Further, the Tennessee Department of Education's regulations regarding Independent Education Evaluation state:

- (5) Independent education evaluation (IEE).

- (a) Each local school system shall develop procedures for providing an independent educational evaluation (IEE) at the request of parents. This procedure shall be approved by the Department.
- (b) The parents have the right to an independent educational evaluation (IEE) at public expense if they disagree with the evaluation provided by the local school system. The IEE must be provided at public expense and without unnecessary delay unless the local school system:
 - 1. Initiates a hearing to show its evaluation is appropriate; or
 - 2. Demonstrates in a due process hearing that the evaluation presented by the parent(s) did not meet the local school system's evaluation criteria. If this is submitted, the parent(s) still have the right to an IEE, but not at public expense.
- (c) Upon request for an IEE, the local school system shall provide the parents information about where an IEE may be obtained and the evaluation criteria to be used.
- (d) If a hearing officer requests an independent educational assessment as a part of a due process hearing, it shall be at public expense.
- (e) Whenever an IEE is obtained, the criteria under which the assessment is obtained, including the location of the assessment and the qualifications of the examiner(s), must be the same as the criteria that the local school system uses when it initiates an assessment.

The results of an IEE must be considered by the local school system, if the IEE meets local school system criteria, in any decision made with respect to the provisions of FAPE to the

TRRMS 0520-1-3-.09

In re-evaluations, it is the responsibility of the IEP team to review the existing information available regarding the child and then to identify what additional data, if any, are needed to determine:

- 1. Whether the child continues to have a disability;
- 2. The present level of performance and educational needs of the child;
- 3. Whether the child continues to need special education and related services;
- and,
- 4. Whether any additional or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals written in the IEP and to participate, as appropriate, in the general curriculum.

Tenn. State Bd. of Educ. R. 05021-1-19.05(5); see also 34 C.F.F. 300.533(a)(1).

Thus, it is the IEP team that determines the extent and nature of evaluation information necessary as part of a re-evaluation. Here, the IEP team had significant information available to it regarding Z. and was not seeking comprehensive evaluation information akin to an initial evaluation. The specific purpose for the assessment requested in August 2002 was to gather more information about Z.'s strengths and weaknesses to ensure that his IEP appropriately addressed his educational needs and to determine whether educational and behavioral interventions in place for him were appropriate.

Once the need for additional information has been identified and parental consent obtained, then the School System has an obligation to ensure that those assessments are completed in accordance with State and Federal standards. 34 C.F.R. 300.532; Tenn. State Bd. of Educ. R. 0520-1-9-.05. When a School System's evaluation has been shown to satisfy the required evaluation procedures set forth in the Federal and State Regulations, the standard has been met and the evaluation must be considered appropriate. See Grapevine-Colleyville Ind. Sch. Dist. V. Danielle R.; 31 IDELR 103 (N.D. Tx, 1999).

Any local educational agency that receives assistance under this part shall establish and maintain procedures to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provisions of a free appropriate public education.

20 USC 1415 (a)

The required procedures shall include (1) an opportunity...to obtain an independent educational evaluation of the child. 20 USC 1415 (b)(1). The law continues that a parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. 34 CFR Sec

300.502(b)(1). If a parent requests an IEE at public expense, the public agency must, without unnecessary delay either initiate a due process hearing or pay for the evaluation. 34 CFR Sec. 300.502

IV. Conclusions

Z., a nine year old boy with moderate to severe autism and severe verbal apraxia has a right to an unbiased and impartial evaluation that addresses his immense individualized needs and objectively reviews his educational programming to make sure it addresses his preferred learning style and meets his individualized needs. Dr. Freeman and Dr. Kennedy's evaluations met the state and federal standards and accomplished the goals of the evaluations.

No evidence supports a finding that Dr. Freeman was biased in conduct of her evaluation or the completion of her report. (Tr. 102-106, 203-205). Though in her initial contact with the School System resulted from the ongoing FAPE litigation, Dr. Freeman complied with standards of ethics and professionalism in refraining from forming judgements regarding Z.'s current abilities and needs until she had the opportunity to assess him and then only after careful consideration of all available and necessary information. (Tr. 102-111). Dr. Freeman complied with all standards of professional practice in completing her evaluation. (Tr. 149).

No evidence supports a finding that Dr. Kennedy was biased in the conduct of his assessment or the completion of his report. (Tr. 24-26, 78). Dr. Kennedy receives approximately 50% of his referrals from school systems and 50% directly from parents and advocacy groups. (Tr. 24-25). Clearly, Dr. Kennedy indicated that he would not

compromise his professional approach or opinions regardless of who has secured his services. (Tr. 25-26, 30, 78 in response to inquiry from ALJ, "Sir I wouldn't accept coaching. It's too important.").

Dr. Freeman's report provided the team with adequate information regarding Z.'s eligibility for special education as a child with autism. (Tr. 151, 223-225). Further, Dr. Freeman's report provided the team with adequate information regarding the necessary contents for Z's IEP. (Tr. 224-225). While much of the information provided by Dr. Freeman's report was consistent with the IEP members' understandings of Z.'s strengths and weaknesses, the IEP team did receive valuable information regarding possible modifications to his program to help Z. develop more independence, particularly with respect to his adaptive (or functional, day-to-day living) skills. (Tr. 223-225).

Dr. Kennedy's report provided the team with adequate information regarding Z.'s eligibility for special education and related services with respect to his behavioral needs. (Tr. 150-151, 228). Further, Dr. Kennedy's report provided the team with adequate information regarding the necessary components of Z.'s educational programming with respect to behaviors, particularly in that Dr. Kennedy's report expressed to the IEP team that he believed the behavioral interventions being employed with Z. were appropriate to Z.'s needs. (Id.).

School systems must ensure that a variety of assessment tools and strategies are used to gather relevant functional and developmental information about the child, including information provided by the parent, and information related to the child's eligibility for special education, the content of the child's individualized education plan (IEP), and ability to be involved in progress in the general curriculum. 34 C.F.R.

300.532; Tenn. St. Bd. of Educ. R. 0520-1-9.05(12). Here, both Dr. Freeman and Dr. Kennedy used a variety of tools and strategies to gather necessary information. They both interviewed numerous persons familiar with Z., including his parents (and his mother in her additional role as Z.'s primary tutor) and his current service providers. They both observed Z. in both his home environment and his public school setting, including numerous settings at school such as his speech language therapy, his regular education environment, instructional time and unstructured recess time.

Any standards tests that are given to a child must be validated for the specific purpose for which they are used and are administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the test. 34 C.F.R. 300.532; Tenn. St. Bd. of Educ. R. 0520-1-9-.05(12)(d). Dr. Freeman has extensive qualifications in the area of assessment of students with autism and in particular with two standardized instruments that she administered. Moreover, the tests were validated for the specific purposes for which Dr. Freeman used them. With the Stanford-Binet, Dr. Freeman specifically noted her modifications to the test and, as a result, used a third level of interpretations as was appropriate. The Vineland, as a parent interview measure, was administered in accordance with its published guidelines and used by Dr. Freeman for the specific purpose for which it is validated. Clearly, the School System's assessments complied with this requirement.

If an evaluation is not conducted under standard conditions, a description of the extent to which it varied from standard conditions must be included in the evaluation report. [34 C.F.R 300.532; Tenn. St. Bd. of Educ. R. 0520-1-9-.05(12)(e)]. Dr. Freeman clearly cautioned about the difficulty of using standardized testing in rendering her report

of Z. and discussed her use of the parent to facilitate administration of the Stanford-Binet. Again, the School System's assessment complied with this requirement.

Similarly, the school system is obligated to ensure that tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single intelligence quotient. 34 C.F.R. 300.532; Tenn. St. Bd. of Educ. R. 0520-1-9-.05(12)(f). With Z., as a child with autism, both Dr. Freeman and Dr. Kennedy were careful to develop a profile of his strengths and weaknesses.

Tests are selected and administered so as best to ensure that if a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude, achievement level, or whatever other factors the test purports to measure. 34 C.F.R. 300.532; Tenn. St. Bd. of Educ. R. 0520-1-9-.05(12)(g). With Z., Dr. Freeman took steps with Z. in terms of selecting appropriate instruments and modifying the administration of the testing to ensure that his limited verbal skills did not result in inaccurate results.

Once evaluations are completed, it is the IEP team's responsibility to meet and review the information to determine if the child continues to be eligible for special education and, if so, to review and/or revise the child's IEP and placement. Tenn. St. Bd. of Educ. R. 0520-1-9-.05(8). Here, the IEP team, including Drs Freeman and Kennedy as well as the parents and their private service provider, convened a lengthy meeting to discuss the information provided and consider its implications for Z. The IEP team members had an opportunity to inquire of Drs. Freeman and Kennedy regarding their reports and did so. As a result of that information, the IEP team accepted some of the

recommendations relative to further assessments, but did determine that the psychological evaluation and FBA provided sufficient information in the relevant areas to continue Z.'s eligibility and proceed with the development of an IEP for Z.

In order to be appropriate, the School System's evaluation must satisfy the criteria established by the State of Tennessee. An evaluation consists of procedures "used selectively with an individual child" "to determine whether a child has a disability and the nature and extent of the special education and related service that the child needs." Tenn. St. Bd. of Educ. R. 0520-1-9-.01(21). The procedures must include a variety of assessment tools and strategies to gather relevant functional and developmental information about the child, including information provided by the parent, and information related to the child's eligibility for special education, the content of the child's individualized education plan (IEP), and ability to be involved in and progress in the general curriculum. 34 C.F.R. 300.532; Tenn. St. Bd. of Educ. R. 0520-1-9-.05(12). Moreover, the procedures must include those tailored to assess specific areas of educational need and not rely on a single procedure as the sole criterion for determining eligibility and educational programming. *Id.* Of course, any standardized testing instruments must be used for their validation purpose and properly administered by trained and knowledgeable personnel. 34 C.F.R. 300.532©(1).

The *only* substantive challenge Respondent articulates regarding the appropriateness of Dr. Freeman's evaluation relates to her use and interpretations of the Stanford-Binet, a standardized IQ test. According to Respondent, Dr. Freeman's use of selected subtest on the Stanford-Binet was improper because "[The parent] testified that

the Stanford-Binet is considered a verbal IQ test from his knowledge of testing,” and Z. is a non-verbal child. Respondent’s Brief, p. 11.

The record is devoid of any evidence that the parent has any sort of expertise in standardized tests, their use, or interpretations sufficient to support his opinion testimony in this highly scientific and complex field. He freely acknowledged that he is not a licensed psychologist and is not an expert in the selection or administration of psychological test instruments. (Tr. 434.)

Dr. Freeman’s use of portions of the Stanford-Binet, her modifications of those portions, and her interpretation of the test results are entirely consistent with applicable scientific standards. Dr. Freeman explained that though standardized tests may be of limited utility in testing students with autism, administration of certain portions of a test, with appropriate modifications, can yield accurate and valuable information regarding the student’s particular strengths and weaknesses. (Tr. 95; Exhibit 6, p. 27-29.) Indeed, Dr. Freeman specifically selected portions of the Stanford-Binet because it allows for adaptation in administration, allows the evaluator to break down skills to obtain a profile of abilities, and because it tests multiple areas of functioning. (Tr. 117-119, 124-129; Ex. 7.)

School Systems must use a variety of assessment tools and strategies, that standardized tests be validated for the purposes for which they are used, that evaluators be trained and knowledgeable, and that tests are selected and administered so as to accurately reflect the child’s aptitude and achievement level. 34 CFR 300.532; Tenn. St. Bd. of Educ. R. 0520-1-9-.05(12). Once a school system’s evaluation has been shown to satisfy the required evaluation procedures set forth in the Federal and State Regulations,

the standard has been met and the evaluations must be considered appropriate. See Grapevine-Colleyville Ind. Sch. Dist. V. Danielle R., 31 IDELR 103 (N.D. Tx, 1999). Respondent has failed to articulate a single evaluation standard that was not met by the School System in this instance.

Clearly, evaluations do not “provide” FAPE (as suggested by Respondent); rather, evaluations provide IEP teams with the information that allows *them* to make placement recommendations that provide FAPE. 34 CFR 300.500(b)(2); Tenn. St. Bd. of Educ. R. 0520-1-9-.01(21). See also Tenn. St. Bd. of Educ. R. 0520-1-9-.05(8)(IEP teams must use evaluative information to determine continued eligibility and programming for student). Indeed, the definition of FAPE is “special education and related services that...are provided in conformity with an [IEP].” 20 USC 1401(8); 34 CFR 300.13; Tenn. St. Bd. of Educ. R. 0520-1-9-.01(25). Evaluations do not define FAPE—IEPs do. Thus, Respondents arguments that the challenged assessments were inappropriate because they did not result in an IEP that the parents agreed with is inapposite and mixes apples and oranges.

The only inquiry before tribunal is whether the assessments performed on behalf of the School System by Drs. Freeman and Kennedy met the requirements of the Individuals with Disabilities Education Act as implemented in Tennessee. (Tr. 455; Parental Handbook, p. 10; see also Tr. 351 (ALJ to Parent: “The issues are the independent evaluation that was done and Hamilton County is the petitioner...if you think Z. is being denied FAPE. I think you should seek due process. then you will be the petitioner, but right now you are defending against [the School System’s] petition saying [it] thinks those evaluations are appropriate.”).) The school district has set forth more

than sufficient evidence to prove that each section of the Federal and State regulations regarding evaluations and IEE for students who are disabled have been met by Dr. Freeman, Dr. Kennedy and the school district, itself.

Should the parents desire an additional evaluation; they have the right to secure an IEE and the right to have that evaluation considered by the School System in making educational decisions regarding Z. 34 CFR 300.502; Tenn. St. Bd. of Educ. R. 0520-1-9-.14(6)(b)(2). (f). However, when the School System's evaluation was appropriate, the parents do not have the right to an additional evaluation *at public expense*. 34 CFR 300.502(b)(3); Tenn. St. Bd. of Educ. R. 0520-1-9-.14(6)(b)(2). [emphasis added]

While this Hearing was confined to a single issue, which was narrowly drawn but agreed to by both parties, it should be stated that the parent attempted to raise several issues, which may have merit in another forum. The parent attempted to raise FAPE issues, FERPA issues, communication, procedural violations, the methodology, inclusion, one-on-one, ABA and adequacy of the IEPs, which were clearly not part of the issue in this Hearing. (Tr. 455) It does appear that several of the points attempted to be raised by the parent were issues that had been heard in previous Due Process hearings. However, if the parent has new issues which have not been addressed in this hearing or in previous hearings now on appeal before the 6th Circuit Court of Appeals, the parent knows his procedural safeguards well enough to initiate a hearing clearly on issues not raised elsewhere.

This Court admonishes the school system, its employees and agents, and the parents to never lose sight of the one individual who is most dependent of wise and careful planning, and that is the student. Z. needs the very best possible deliberations

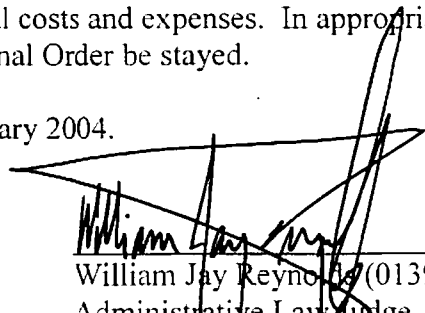
from the adults in his life to assist him in his educational success and not a bunch of adults who are trying to “prove “ their view as best and lose sight of Z.

V. Order

1. It is **HEREBY ORDERED** that the evaluations of Z. completed by Drs. Freeman and Kennedy meet the standards as set forth in IDEA and the State of Tennessee regulations.
2. It is **FURTHER ORDERED** that permission by the parent for an Independent Educational Evaluation paid for by the school system is denied.
3. It is **FURTHER ORDERED** that Hamilton County School System is the prevailing party.

THIS DECISION IS BINDING UPON ALL PARTIES UNLESS APPEALED. Any party aggrieved by the findings and decision may appeal to the Davidson County Chancery Court of the State of Tennessee, or may seek review in the United States District Court for Tennessee. Such an appeal must be taken within sixty (60) days of the entry of final order in non-reimbursement cases and with three (3) years in cases involving reimbursement of educational costs and expenses. In appropriate cases, the reviewing Court may direct that this Final Order be stayed.

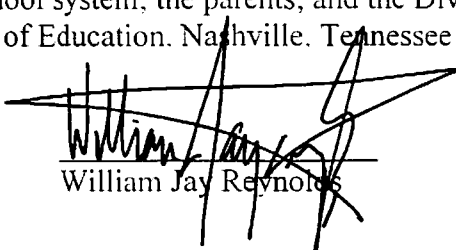
ENTERED this the 20th day of February 2004.



William Jay Reynolds (013932)
Administrative Law Judge
611 Court Street
Savannah, TN 38372
(731) 925-7000

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Final Order was mailed on the 20th day of February, 2004 to: counsel for the school system; the parents; and the Division of Exceptional Children, State Department of Education, Nashville, Tennessee 37243-0375.



William Jay Reynolds